

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/12/2002

CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2002-000141

FILED: _____

STATE OF ARIZONA

SAMUEL K LESLEY

v.

FRANK LUIS GUZI GIULIANI

JOSE S PADILLA

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC
HONORABLE PATRICIA WHITEHEAD
PHOENIX CITY COURT
300 W WASHINGTON ST
PHOENIX AZ 85003

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #6007355

Charge: 2. B.A.C. OVER .10%
3. IMPROPER POSITION RIGHT TURN

DOB: 04/09/59

DOC: 03/31/01

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This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since its assignment. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Phoenix City Court, and the Memoranda of counsel.

The first issue raised by Appellant concerns whether the trial judge erred in refusing Appellant's request for the judge to take judicial notice of "the Arizona Administrative Code Regulation which provides for the (+ or -) 10% accuracy limits also known as the margin of error for the Intoxilyzer device."¹

Rule 201 of the Arizona Rules of Evidence provides in subsection B:

A judicially noticed fact should be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

Judicial notice is mandatory when requested by a party "and (the court is) supplied with the necessary information."² "Necessary information" means information sufficient to satisfy the court that the fact is one for which judicial notice is appropriate as defined within Rule 201(b), Arizona Rules of Evidence, as quoted above.

In the instant case, the trial judge had the opportunity to explain in detail her ruling denying Appellant's counsel's

¹ Appellant's Opening Memorandum, page 1.

² Rule 201(d), Arizona Rules of Evidence.

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request that she take judicial notice of the Arizona Administrative Code Regulations concerning accuracy limits. In ruling upon Appellant's Motion for a New Trial, the trial judge explained her ruling denying the request to take judicial notice:

I noticed, and as I recollect in the trial, Mr. Padilla, when you asked me to take judicial notice of these matters, one of the things I believe that you said was that the regulations - - and I'm quoting out of your motion now - - the regulations provide for the so-called plus or minus 10% error factor. And the error factor plus or minus 10% in results reported by any of the accepted breath tests devices including the Intoxilyzer 4011A is conceded.

First of all, I think I would have abused my discretion to do as you had asked me to. Second of all, I let you argue it (the Administrative Regulations concerning margin Of error) in closings. But third, its factually incorrect. There is no 10% plus or minus error factor no matter how people want to talk about it colloquially.

The fact of the matter is it's a 10% plus or minus precision limitation of the device....

And so what as I was asked to take judicial notice of would have been technically improper.
...³

The trial judge, displaying a superior knowledge and proficiency and chemistry, clearly pointed out to counsel a technical error with the fact that she has been requested to take judicial notice about. More importantly, as the trial judge noted,

³R.T. of March 5, 2002, at pages 127-128.
Docket Code 512

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though the request for judicial notice was denied, Appellant was not prejudiced because Appellant's counsel was permitted to argue accuracy limits and the margin of error in closing argument. This Court finds no error in the trial judge's impressive display of her knowledge of chemistry and alcohol measuring devices.

The remaining issue raised by the Appellant concerns the sufficiency of the evidence to warrant his conviction for Driving with a Blood Alcohol Content in Excess of .10, in violation of A.R.S. Section 28-1381(A)(2). When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.⁴ All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.⁵ If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.⁶ An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.⁷ When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.⁸ The Arizona Supreme Court has explained in State v. Tison⁹ that "substantial evidence" means:

⁴ State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980); Hollis v. Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).

⁵ State v. Guerra, supra; State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

⁶ State v. Guerra, supra; State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

⁷ In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; Ryder v. Leach, 3 Ariz. 129, 77P. 490 (1889).

⁸ Hutcherson v. City of Phoenix, 192 Ariz. 51, 961 P.2d 449 (1998); State v. Guerra, supra; State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).

⁹ SUPRA.

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More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.¹⁰

This Court finds that the trial court's determination was not clearly erroneous and was supported by substantial evidence.

IT IS ORDERED affirming the judgment of guilt and sentences imposed.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all further and future proceedings.

¹⁰ Id. At 553, 633 P.2d at 362.
Docket Code 512